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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 842

ALLIED STEVEDORING CORPORATION, JOHN WARD, JOHN POTTER and MICHAEL BOWERS,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
(a) The Opinion Below	2
(b) Statement of Grounds of Jurisdiction	2
(c) Questions Presented for Review	2
(d) Statutes Involved	3
Internal Revenue Code of 1939, Title 26 U.S.C.	3
Sec. 145. Penalties	3
Sec. 3616. Penalties	4
Federal Business Records Act, Title 28 U.S.C.	4
Sec. 1732. Record made in regular course of business	4
(e) Statement of Case	5
(f) Jurisdiction of the Court Below	10
(g) Reasons Relied On	10
As to Question 1	10
As to Question 2	11
As to Question 3	13
As to Question 4	14
As to Question 5	16
Conclusion	18
Appendix A—Opinion	19
B—Judgment	40
C—Press Report (Trial Court's Exhibit 5 for Identification)	42

CITATIONS

PAGE

Cases:

Achilli v. United States, Supreme Court Docket No. 430 10

Berra v. United States, 351 U. S. 131 (1956) 10, 11, 12
Briggs v. United States, 221 F. 2d 636 (6th Cir. 1955) 13

Costello v. United States, Supreme Court Docket No. 666 10

Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952) 13

Harrison v. United States, 200 Fed. 662 (6th Cir. 1912) 13

Imholte v. United States, 226 F. 2d 585 (8th Cir. 1955) 11

Johnson v. Lutz, 253 N. Y. 124 (1930) 15

Langer v. United States, 76 F. 2d 817 (8th Cir. 1935) .. 13

Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467 (3d Cir. 1950) 15

National Labor Relations Board v. Sharples Chemicals, 209 F. 2d 645 (6th Cir. 1954) 16

Pekelis v. Transcontinental & Western Air, 187 F. 2d 122 (2d Cir. 1950), cert. denied 341 U. S. 951 15

PAGE

Sheppard v. Florida, 341 U. S. 50 (1951) 13

United States v. Albanese, 224 F. 2d 879 (2d Cir. 1955), cert. denied 350 U. S. 845 11
United States v. Grayson, 166 F. 2d 863 (2d Cir. 1948) 15
United States v. Rosenberg, 200 F. 2d 666 (2d Cir. 1952) 13

Vloutis v. United States, 219 F. 2d 782 (5th Cir. 1955) 11, 12

Statutes:

26 U. S. C. 145(b) 2, 3, 5, 10, 11, 12

26 U. S. C. 3616(a) 2, 4, 9, 10, 12

28 U. S. C. 1254 2

28 U. S. C. 1291 10

28 U. S. C. 1732 ..... 3, 4, 15

Rule 35, F. R. Cr. P., Title 18 U.S.C. 9

Section 374a, New York Civil Practice Act 15

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed their convictions for wilfully attempting to evade corporate income taxes by filing a false tax return.

(a) The Opinion Below

The opinion of the Court below has not been officially reported. A copy thereof is annexed hereto as Appendix A (see p. 19, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on February 4, 1957.

2. Timely application for rehearing was made on February 18, 1957 and was denied on February 25, 1957.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

(c) Questions Presented for Review

1. May defendants convicted of having wilfully attempted to evade tax by the filing of a false and fraudulent return be sentenced under 26 U. S. C. 145(b) of the Internal Revenue Code of 1939 rather than under 26 U. S. C. 3616(a) of that Code?

2. Where the indictment charges an attempt to defeat and evade taxes for a calendar year by filing and causing to be filed a false and fraudulent tax return, and no evidence was introduced at the trial as to knowledge of, or participation in, the filing of the tax return in question as to two of the defendants, was there such a fatal variance between the indictment and proof, or insufficiency of proof, as to require dismissal of the indictment as to those defendants?

3. Did publicity generated during the course of the trial by the United States Attorney so prejudice the defendants as to require granting of a new trial?

4. Did the trial court commit reversible error in holding that an exhibit containing multiple hearsay and relating to a period of time subsequent to the crime charged was admissible under the Federal Business Records Act, 28 U. S. C. 1732?

5. Were certain notebooks, which were introduced in evidence by the Government to establish approximately 40% of the alleged unreported income, properly introduced through a competent witness under the Federal Business Records Act?

(d) Statutes Involved

Internal Revenue Code of 1939, Title 26 U. S. C.

§145. Penalties

* * *

"(b) Failure to collect and pay over tax, or to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

§3616. Penalties

"Whenever any person—

(a) False returns.

Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Federal Business Records Act, Title 28 U. S. C.

§1732. Record made in regular course of business

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

(e) Statement of Case

Petitioners were indicted on one count charging that they "did unlawfully, wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the Allied Stevedoring Corporation to the United States of America for the calendar year 1951, by filing and causing to be filed * * * a false and fraudulent income tax return * * *." The indictment made reference to 26 U. S. C. 145(b).

Allied Stevedoring Corporation (hereafter "Allied") was a public loader on piers 84 to 92 on the North River in New York City in 1951. Petitioners Ward, Potter and Bowers were its president, vice-president and secretary-treasurer respectively at the time of the filing of the 1951 tax return. Public loaders performed the function of loading and unloading trucks transporting merchandise to and from the piers.

The evidence established that the corporate tax return was filed on March 11, 1952, and that it had signed by petitioner Ward. No evidence was introduced at the trial to show any knowledge on the part of petitioners Potter and Bowers as to the contents of the return, or its filing.

The trial began on February 6, 1956 and was concluded on March 23, 1956. Throughout the trial the Government brought out that the officers and employees of Allied were members of, or associated with members of the International Longshoremen's Association and its Local 824. On February 23, 1956, in the course of the trial, the United States Attorney caused to be filed an indictment against one Patrick J. Connolly, and at the same time called a press conference and issued the following press release:

> "Paul Williams, United States Attorney for the Southern District of New York today announced that

a Federal Grand Jury had returned an indictment against Patrick J. (Packy) Connolly, Executive Vice President of the International Longshoremen's Association. Connolly has been charged with evasion of income taxes for the years 1949, 1950 and 1951.

Mr. Williams said that the case had been presented to the Grand Jury by Assistant United States Attorney Myles J. Ambrose. Mr. Ambrose said that Connolly failed to report income totalling $12,050.00 for the three years and pay additional taxes amounting to $3,251.68. The unreported income was mainly derived from Connolly's position as editor of the Longshore News, a now defunct monthly newspaper, published by the Atlantic Coast District of the I.L.A. Additional monies which the defendant failed to report were obtained as fees for attendance at meetings of the executive board of the Atlantic Coast District.

Previous to his ascending to the post of Executive Vice President of the I.L.A., Connolly was President of Local 824. Another former officer of that local, Mickey Bowers, is presently standing trial in the Federal Court here for income tax evasion in connection with his operation of the Allied Stevedoring Company. Connolly was among the organizers of this public loading company and was its first president.

Mr. Williams stated that the defendant could receive a prison sentence of fifteen (15) years and a fine of $30,000.00, if convicted. He will be arraigned on March 1, 1956 before United States District Judge John W. Clancy." (Emphasis added.)

Press reports resulting from the release appeared in all of the local newspapers. The article appearing in the New York Daily News was the most damaging and was read by five of the jurors. This article, Court's Ex. 5 for Id., is reproduced *infra*, p. 42, as Appendix C. Three jurors, including an alternate, read articles in other newspapers.

Mr. Williams, the United States Attorney, at a hearing in chambers, admitted issuance of the release with knowledge that the petitioners herein were on trial. He further admitted that he had marked in brackets before the press conference the allusion in the release to the "Bowers case" because he realized it was a "sensitive point"; that he had said at the press conference substantially everything contained in the release; and that he had also discussed the "Bowers case" with the reporters and talked to them about the Special Grand Jury considering "racketeering on the waterfront." Three copies of the press release were given to the reporters.

The trial court interrogated the jurors as to whether their judgment had been "impaired" by reading the articles, and they replied in the negative. A motion for a mistrial was denied.

On February 29, 1956 the motion for a mistrial was renewed based on articles in two New York newspapers as to the filing of two indictments and an information against three public loaders on the North River piers of New York on charges of failure to file income tax returns. While the petitioners were not mentioned in these articles, defense counsel alleged that the indictments and information were not inadvertent, that they indicted the entire industry of public loading and deprived the defendants of a fair trial. Subsequently the trial court denied the motion, stating that it had discussed the matter *ex parte* with Mr. Williams and that he had stated that while he had announced the filing of the indictments and information, no press release had been issued. No hearing was held or inquiry made of the jury.

At the trial the Government claimed that Allied's income for the tax year in question had been understated by approximately $72,000. It was alleged that $29,183.00 of

the total was received by Allied for rental of machines to John White & Co., a public loader at neighboring piers. That Allied had rented machines to John White & Co. was undisputed; however, the amount of rental income was seriously in issue. John White, head of the company, was deceased at the time of the trial and the Government sought to prove the amount through certain notebooks alleged to have been kept by him. The Government witness who introduced the records was one Walter T. Hampson, a construction management engineer employed by the United States Government in its Corps of Engineers. He testified that in 1950 he showed White how to set up double entry books and would intermittently pick up certain notebooks from White and total entries therein and make notations as to social security taxes and other expenses. Hampson never saw White write in the books and he testified that he had no way of vouching for the accuracy of the information contained in them. In answer to the question whether the books were "records kept in the regular course of business of John White's operation?" Hampson could only answer "That is the only records I saw, sir." Hampson had no familiarity with White's business. John White & Co. was allegedly a partnership of nine or ten partners, all drawing equal partnership profits. Nevertheless, five of the alleged partners who testified at the trial had never seen the records in question. The notebooks were received in evidence over strenuous objection as Exhibits 20, 21 and 22. Summaries from these exhibits were received in evidence as Exhibits 23 and 24.

The Government also introduced in evidence through American Export Lines employees Exhibit 222, which reads as follows:

"At 10.30 a.m. on Thursday, November 13, 1952 Mr. W. E. Denniston telephoned Mr. S. S. Abbate to advise that a Mickey Bowers informed him that any figures regarding the number of men used for loading at Pier 84, N. R. were not to be used by the American Export Lines, Inc.

Mr. Abbate asked Mr. Denniston who Mr. Monk got his figures from that were given to Mr. Lechner and was advised that Mr. Monk got the figures from Mr. Potter.

Mr. Abbate advised Mr. Andrews accordingly on the same day."

Objection was made to this exhibit on the ground that it contained multiple hearsay and that it was irrelevant as it pertained to an event on November 13, 1952, subsequent to the filing of the tax return. The objection was overruled.

Upon conviction the petitioners were sentenced as follows: Allied—$10,000 fine; Bowers—five years imprisonment, $10,000 committed fine plus one-half of the costs of prosecution; John Potter—one year and one day imprisonment; Ward—four years imprisonment, $10,000 committed fine plus one-half of the costs of prosecution.

A motion under Rule 35 of the Federal Rules of Criminal Procedure, Title 18 U. S. C., was made to the district court on July 9, 1956 to vacate and correct the sentences imposed on the petitioners because in excess of the maximum sentence (one year imprisonment and/or fine of $1,000) permissible under Section 3616(a). The motion was denied by opinion dated July 20, 1956.

(f) Jurisdiction of the Court Below

The district court had jurisdiction under Sections 145(b) or 3616(a) of the Internal Revenue Code of 1939, Title 26 U. S. C. The Court of Appeals had jurisdiction under 28 U. S. C. 1291.

(g) Reasons Relied On

As to Question 1

This point again presents to this Court the important question of federal criminal law discussed in this Court's decision in *Berra* v. *United States,* 351 U. S. 131 (1956). Petitioners claim that since the charge in the indictment is the filing of a false return, they should have been sentenced under the misdemeanor provisions of Section 3616(a) of the Internal Revenue Code of 1939, rather than the felony provisions of Section 145(b). For our argument on this point we rely on the discussions in the minority decision in the *Berra* case and in the petition for a writ of certiorari filed in the case of *Frank Costello* v. *United States of America,* Docket No. 666. The Solicitor General has consented to the granting of certiorari in the *Costello* case and it has been so granted by this Court. Further, the Court has now granted certiorari in the case of *Achilli* v. *United States of America,* Docket No. 430, on the same point.

The petitioners properly raised the issue in the district court and in the Court below. The Court below stated that the *Costello* case is dispositive of the issue raised herein as to the petitioners.

Accordingly, it is submitted that this case should be added to the group now under consideration as to the point in issue.

As to Question 2

There was no evidence as to knowledge of, or participation in the filing of the corporate return on the part of petitioners Potter and Bowers. The district court denied a motion to dismiss on this ground, holding that the language in the indictment pertaining to "filing and causing to be filed a false and fraudulent tax return" was surplusage. It held that the Government could charge in an indictment that a defendant evaded taxes "in any manner" in the general language of Section 145(b) without specifying the manner; and if it did so specify by charging the means was filing and causing to be filed a false and fraudulent tax return, that such restriction on the charge is surplusage.

The Court below affirmed this ruling and stated further that petitioners Potter and Bowers were guilty as principals for having "aided and abetted" Ward. However, the Court below erred because *knowledge* is required to aid and abet. No evidence was introduced at the trial, or contention made that there was knowledge on the part of these petitioners. Therefore, it could not have been established that they aided and abetted in the filing of the return.

The decision that the language in the indictment as to filing of the return is surplusage accords with the decision of the Court below in *United States* v. *Albanese,* 224 F. 2d 879 (2d Cir. 1955), cert. denied 350 U. S. 845, and the decision of the Court of Appeals for the Eighth Circuit in *Imholte* v. *United States,* 226 F. 2d 585 (8th Cir. 1955). However, it is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Vloutis* v. *United States,* 219 F. 2d 782 (5th Cir. 1955) and this Court's decision in *Berra* v. *United States,* 351 U. S. 131 (1956).

The *Vloutis* case is a flat holding that if an indictment under Section 145(b) charges a wilful attempt to evade taxes by filing a false return, the offense is the filing of the return.

This holding is inherent in both the majority and dissenting opinions of this Court in the *Berra* case. The issue in that case was whether the trial court should have charged the jury that the defendant could be found guilty of the lesser offense under Section 3616(a), rather than Section 145(b). This Court held that since the two statutes overlapped, the jury was not required to decide. This Court stated:

> "For here the method of evasion charged was the filing of a false return and it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by the filing of false return [Section 145 (b)] were identical with those required to prove that he delivered a false return with 'intent' to evade taxes [Section 3616(a)]. In this instance Sections 145(b) and 3616(a) cover precisely the same ground." (p. 134)

Unless the filing of the return, as charged, is part of the crime, the crime charged under Section 145(b) would not overlap Section 3616(a). Under the decision by the district court in this case, affirmed by the Court below, that the language as to the filing of a false return is surplusage, and that the crime is "evasion in any manner," a Section 145(b) charge could *never* cover "precisely the same ground" as a Section 3616(a) offense, and this Court in the *Berra* case would have had to hold that the trial court erred in not charging the possibility of finding the lesser offense.

While it is clear that an indictment need not charge evasion by filing a false return, having charged its manner

of evasion, the Government is bound to prove such charge, and a variance in proof must be held to be fatal. It is submitted that there was a deficiency in proof which required the dismissal of the indictment as to petitioners Potter and Bowers.

The decision by the Court below is in conflict with the decision of the Court of Appeals for the Fifth Circuit and is, accordingly, an important question of federal law which has not been, but should be, settled by this Court.

As to Question 3

The publicity generated by the United States Attorney was intentional. By this we mean that the United States Attorney had knowledge of the contents of the press release he issued, and knew that it would be publicized, and further knew that the petitioners herein were on trial.

The motion for a mistrial was not based on the newspaper reporting alone [see, *e.g. Briggs* v. *United States*, 221 F. 2d 636 (6th Cir. 1955)], but on the provoking of the publicity by the United States Attorney's office. Where the Government itself issues publicity in the course of a trial, which publicity tends to prejudice the defendants on trial, it has been held that a motion for a mistrial should be granted. *United States* v. *Rosenberg*, 200 F. 2d 666 (2d Cir. 1952); *Delaney* v. *United States*, 199 F. 2d 107 (1st Cir. 1952); *Harrison* v. *United States*, 200 Fed. 662 (6th Cir. 1912); *cf. Sheppard* v. *Florida*, 341 U. S. 50 (1951); *Langer* v. *United States*, 76 F. 2d 817, 827-28 (8th Cir. 1935).

In this case the United States Attorney caused the indictment against an associate of the petitioners to be filed in the course of their trial, and his press release specifically referred in an extremely prejudicial manner to the case on trial. The jury read these stories. The issue is

not whether they *answered* that they would not be disabled from rendering an impartial verdict, but whether the nature of the press release and the facts surrounding its issuance are such that the trial court should have held that the issuance of the publicity necessarily deprived the petitioners of a fair trial.

It should be noted that the Court below adopted as true the error in the newspaper article describing petitioner Bowers as a former officer of the union's local; indeed, the Court below compounds the error by describing Bowers as "president" of the local. This evidences the effect the press reports must have had on the jury. The Court below, in its opinion, stated: "When all is said, if the associates of an accused person have a bad reputation, the best that can be done is to avoid all allusions to them that can be escaped * * *." The "best" was clearly not done in this case. Not only does the Court below ignore its own and other prior decisions to that effect, but it omitted entirely any reference to the trial court's refusal to hold a hearing or interrogate the jury as to the second publicity incident.

It is submitted that the decision of the Court below is in conflict with its own and other appellate decisions, and presents an important question of federal law for this Court to decide.

As to Question 4

The sustaining by the Court below of the admission into evidence of a highly prejudicial exhibit containing multiple hearsay was in conflict with its own prior decisions.

Exhibit 222, set forth *supra,* at p. 9, is a memorandum made subsequent to the filing of the tax return in question

and purports to record, among other things, a statement made by petitioner Bowers to Denniston, an employee of the American Export Lines, which statement was purportedly conveyed to Abbate, another employee of the shipping line. The memorandum was recorded by one Louis Lechner, office assistant to Abbate, and it was introduced in evidence through him. Denniston testified at the trial that he had no recollection as to Ex. 222 or its contents.

The admissibility of multiple hearsay under the Federal Business Records Act, 28 U. S. C. 1732, was considered by the Court below in *United States* v. *Grayson*, 166 F. 2d 863 (2d Cir. 1948) wherein it held that:

> "The [business entry] statute did not mean to make competent whatever the entrant picked up from random sources, although it was part of his business to pick up information where and when he could and make a record of it. The 'act, transaction, occurrence or event' which the entrant records must be one of which either he has knowledge, or which he learns from a declarant who shall 'in the course of the business transmit the information for inclusion in the memorandum.' 'Multiple hearsay' is no more competent now than single hearsay was before." (p. 869)*

See also *Johnson* v. *Lutz*, 253 N. Y. 124 (1930), as to the similar New York Statute, Section 374-a of the New York Civil Practice Act.

The purpose of Section 1732 was to eliminate the necessity of calling the entrant of a record,—not to make competent notations to which the entrant could not properly

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* The exception established by the appellate courts to the multiple hearsay rule applies only to investigative reports by a form of official board. *Pekelis* v. *Transcontinental & Western Air*, 187 F. 2d 122 (2d Cir. 1950), cert. denied 341 U. S. 951; *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 F. 2d 467 (3d Cir. 1950).

testify. The Court below held that double hearsay was not involved since the statement attributed to Bowers was not a statement of fact, but an instruction. Whether the statement was an instruction or not, there was still multiple hearsay involved,—*i.e.*, from Bowers to Denniston to Abbate to Lechner.

The Court below adds a theory that the memorandum could be admissible as a "recorded entry by Denniston." By this the Court could only mean a form of "past recollection recorded." Never having seen the exhibit, and having no recollection of the event, Denniston could not introduce it as his "past recollection recorded."

The prejudice of the exhibit is apparent. The Government asked the jury to infer from the exhibit that Bowers had asked the shipping line to falsify its figures as to an important fact in the case, *i.e.* the number of loaders at Pier 84.

As to Question 5

This question presents an important issue of federal law under the Business Records Act upon which there are virtually no decisions. Was the person through whom the White notebooks were introduced at the trial a competent witness to introduce such evidence?

Section 1732 makes admissible a record "made in regular course of any business, and if it was the regular course of such business to make such" record. Before a document can be admitted under Section 1732, it must be identified by a person competent to testify that it was a record kept in the regular course of business and that it was the regular course of business to keep such record. As the Court of Appeals for the Sixth Circuit stated in *National Labor Relations Board* v. *Sharples Chemicals*, 209 F. 2d 645, 654 (6th Cir. 1954):

> "* * * To be admissible under the statute [Section 1732] certain qualifications must be met, such as being identified as corporate records and the manner in which they were prepared."

The witness who introduced the White records had no connection with or knowledge of the operations of the White & Company business. All he could testify to was that White would hand the books to him or leave them for him at a tavern and that he would make certain notations thereafter. Any remarks by White to him referring to the notebooks were stricken by the trial court. Hampson had no familiarity whatsoever with White's business. Under the requirements of Section 1732, he was not a competent person to introduce the exhibits and they should have been excluded. Since the notebooks were introduced to establish $29,183.00 of the total unreported income alleged by the Government, their introduction in evidence, if by error, was necessarily prejudicial.

As the opinion below notes, Judge Frank had expressed doubt on this point. However, the Court, in its opinion, erroneously called Hampson an accountant and stated that the objection to the competence of the books is "so patently untenable that we shall not discuss it." The trial court had considered the admissibility of these notebooks to be a borderline issue. Business records are not subject to cross-examination as in the case of live witnesses. Therefore the competency of the person introducing the records is a matter of great concern. It is submitted that the objection to the witness in this case was valid, and not "patently untenable."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 120—October Term, 1956.

(Argued December 3, 1956 Decided February 4, 1957.)

Docket No. 24119

UNITED STATES OF AMERICA,

Appellee,

v.

ALLIED STEVEDORING CORP., JOHN WARD, JOHN POTTER and MICHAEL BOWERS,

Appellants.

Before:

CLARK, *Chief Judge,* and HAND, *Circuit Judge.*

On appeal from judgments of conviction of the District Court for the Southern District of New York (Palmieri, *J.*, presiding) for violation of §145(b), Title 26, U. S. Code, by attempting to "defeat and evade" the income tax due from the corporate defendant for the year 1951.

NORMAN S. BEIER, *for the Appellants.*

MARTIN CARMICHAEL, JR., and JOSEPH DEFRANCO, *for the Appellee.*

Appendix A

HAND, *Circuit Judge*:

The defendants appeal from a judgment convicting them under §145(b), Title 26, U. S. Code, of attempting to "defeat and evade" the income tax for the year 1951 of the Allied Stevedoring Corporation, which we shall speak of as "Allied." The appeals came on to be heard before a panel consisting of the Chief Judge, Judge Frank and me on December 3, 1956, and was submitted upon oral argument and printed briefs, that of the appellee being filed on December 19th. In accordance with the usual practice of this court each of the judges filed a memorandum independently, stating his conclusions in detail upon the points involved. Judge Frank's memorandum is dated January 10, 1957, two days before his death; it takes up seriatim all the thirteen "Points," raised in the appellants' brief, and overrules all but VII(a), and also a part of XI and XII, as to which, so far as he considers them valid, he holds the error to have been harmless. The memorandum concludes: "With some doubt as to point VII(a), supra, I vote to affirm." Section 46(d) of Title 28, U. S. C., provides that "A majority of the number of judges authorized to constitute a court or division * * * shall constitute a quorum"; and even when a judge has resigned after argument, or has died after expressing his dissent, a remaining majority has jurisdiction to dispose of the appeal.* *A fortiori* is this true when one judge has died after ex-

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* *Hatch* v. *Morosco Holding Co.*, 19 F. 2d 766 (C. A. 2); *United States* v. *Graham*, 102 F. 2d 436, 444 (C. A. 2); *Gwathmey* v. *United States*, 215 F. 2d 148, 160 (C. A. 5).

pressing his concurrence in the disposal adopted by the majority.*

The first question is whether the evidence supports the verdict, and this requires some statement of the way in which the "loading" was done on piers 84, 88, 90 and 92 in 1951, for which year "Allied" filed its return. By "loading" we shall mean both putting goods on the floor of a pier from arriving trucks, or putting them upon waiting trucks from the floor of a pier. These were the only activities of "Allied," the physical working being done by members of Local Union 824 of the International Longshoremen's Union, as employees. When the trucks came to the piers and were loaded or discharged, payment to "Allied" was made in two ways. One was for the truck driver to sign a printed "slip" on which a foreman of "Allied" set down the goods loaded or unloaded and the amount due. The foreman would then give the "slip" to Potter, "Allied's" vice-president, who would in turn give it to a collector for "Allied," and he would collect from the trucking company and remit to "Allied." The other way was for the truck driver to pay the foreman in cash on the pier, and to take the "slip" with a receipt upon it signed by the foremen. The "slips" so signed the drivers would then take to their employers in settling their accounts.

A part of the payments is undisputed; it is common ground that a witness, named Applegate, would receive

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* *Ayrshire Corp.* v. *United States,* 331 U. S. 132, 138; *Marcus* v. *Kane,* 18 F. 2d 722 (C. A. 2); *Commercial Credit Corporation* v. *United States,* 18 F. 2d 927 (C. A. 2); *Klein* v. *Palmer,* 18 F. 2d 932 (C. A. 2); *Ruby S.S. Co.* v. *Johnson & Higgins,* 18 F. 2d 948 (C. A. 2); *United States ex rel. Patti* v. *Curran,* 18 F. 2d 953 (C. A. 2); *National Surety Co.* v. *Mass. Bonding & Ins. Co.,* 19 F. 2d 448 (C. A. 2).

from Potter "slips" signed by drivers, and take them to the drivers' employers, usually, though not always, receiving cheques in payment that he would give to Potter. These cheques, together with about $3,700 in cash as will appear, must have made up the $90,000 that "Allied" returned as gross income. The prosecution succeeded in tracing $58,000 of these cheques from the truckers, but not the other $30,000. The conceded expenses of "Allied" were about $90,000, so that to succeed the prosecution was forced to prove much larger gross receipts. Its position was that "Allied" had received large sums in cheques or cash that never got into its $90,000 bank deposit, but that the three individuals kept for themselves. The main outline of its proof was that all four of the steamship lines which were lessees of the four piers in question had "designated" "Allied" as their "public loader" for 1951, in compliance with a notice by the New York Department of Marine and Aviation that "public loaders are permitted * * * only pursuant to your written permission." The prosecution argued that this established prima facie at least, that whatever loading went on upon those piers was done by "Allied." It then put in evidence a great number of "slips" identified as those that had been issued to drivers of truckers and that they had been paid in one way or another. The "slips" had all been printed for "Allied," and bore the number of one of the four piers in question; "Allied's" telephone number was printed upon them and the drivers' names were signed. The argument was that the sum of the amounts contained upon these "slips" was part of the income received in 1951.

The defendants sought to meet this evidence by showing that one, La Magna, a "loader" at South Kearney,

New Jersey, had used the same printed "slips" which he procured from someone apparently in the printer's employ. (In all but two instances, however, La Magna had struck out the printed pier number.) In addition several of "Allied's" foremen at the piers testified that they signed "slips" of the same printed issue, for work done by several other "loaders"; for the most part by two, named "Ryan" and "Reilly," who on exceptionally busy days helped out loading on the piers. The driver of a truck would tell the foreman to make out his "slip" in favor of "Ryan" or "Reilly," who would receive and cash it on their own account either on the pier or by cheque from the trucker. The defendants explained this practice, notwithstanding the "designation" of "Allied" as the only "loader" on the four piers, on the ground that the prescribed system was by no means rigidly observed. They therefore insisted that there was no basis for the conclusion that "Allied" had received the sum of all the payments recorded on the "slips." In addition to "Ryan" and "Reilly" some of the foremen also mentioned other supposed "loaders"; *e.g.*, Hammo, "Bluenose" and others.

In rebuttal of this alleged infirmity in its evidence the prosecution proved that "Ryan" and "Reilly" had disappeared in 1953, to which the defendants retorted that they had probably found it safer to leave after an investigation started of conditions on the piers (the inference being, as we understand it, that it was the part of wisdom for them as unlicensed "loaders" to disappear). Moreover, the prosecution proved that at least on one occasion "Allied's" president, Ward, had procured for the corporation the proceeds of a cheque issued to "Ryan." This evidence was as follows. One Leahy, an employee of "Allied"

testified that "Ryan" and "Reilly" had given him cheques to cash which they had received for loading done by them. Leahy was arrested in January 1951, and a cheque for about $700 payable to "John Ryan" was found upon his person. This cheeque the detective who had made the arrest took to the defendant, Potter, who told him that the name of the payee was a mistake. Moreover, the defendant, Ward, followed this by a letter to the trucker who had drawn the cheque, declaring: "We are the Union Loaders at Pier 88 * * * and your check should have been made to our name, Allied Stevedoring Co. and to no one else." The endorsement upon this cheque in the name of "John Ryan" was in fact made by one, Lussa, who was apparently in the habit of cashing cheques.

Another instance was the testimony of a witness, named Marcel, that a man, whom he merely knew by the name of Murphy, was in the habit of bringing to him "slips" of the issue that we have mentioned which had been delivered to "loaders" at the piers. Marcel paid Murphy 93% of the amount stated and collected the full amount from truckers against whom they were charged. Marcel paid Murphy in cash which Murphy took away, presumably either to pay the "loaders," or to repay himself, if he had already himself cashed them. The prosecution traced $19,300 of such payments made to Marcel, and argued that they were part of "Allied's" income, not only because it was proper to infer so from the fact that "Allied" alone (with the exception of La Magna) had any access to the printed "slips," but also because on fifteen or twenty occasions there had been differences of amount between the "slips" and what the trucker agreed to be the proper charge, and that in these cases he called up Potter on the telephone. Although

he did not know Potter's voice, on Murphy's next visit Murphy settled the difference. We agree with the prosecution that from this the jury might have inferred that the "slips" had been issued for "loading" done for "Allied."

Next there are two items, one of about $8,000, the other of $5,000, made up of about $3,700 to the order of "cash" and about $8,000 in cheques to the order of "Ryan" or "Reilly." Of the balance about $700 went to one, Sullivan, and about $1,000 were made payable to miscellaneous payees. All this money was received from the truckers in exchange for "slips" in the same name as that of the payees. The cheques, and presumably some cash also, Francis Applegate testified that he collected for the payees. The inference that this money was in fact paid to "Allied" rests upon the fact that it alone was a licensed "loader," and upon the doubts as to the existence of "Ryan" and "Reilly" arising from the evidence we have already detailed. The total of all the payments for "slips" is about $50,000, against which the prosecution acknowledged a credit of about $5,000, leaving $45,000 undeclared.

In addition to these receipts the prosecution proved the receipt of rental from a "loader," named White, for the use of what are called Hi-Lo machines, large machines that raise or lower heavy goods such as rolls of paper-print. The agreed rent to be paid by White was half his earnings and it was collected in cash by one, Gallagher, who paid it to Potter or Bowers directly. The amount as shown on White's books was $29,000. White kept a set of books showing his receipts from truckers for the use of the machines, and had an arrangement with an accountant, named Hampson, by which Hampson at White's request examined White's books each week and from them made up for White

a set of "double entry books." The objection to the competence of these books on the ground that they were not shown to have been kept in the regular course of White's business is so patently untenable that we shall not discuss it.

From all these circumstances we agree that the jury might properly have found that "Allied" had received over $70,000 that it did not declare. We recognize indeed that this conclusion rests upon the premise that the income actually declared—$90,000—did not contain any part of this sum, and in support of this the prosecution proved that $58,000 of "Allied's" bank deposit was from cheques that could not have duplicated any of these figures; it gave credit also for $3,700 of cash deposited in the account. Thus at best the bank deposit could have included only $28,000 ($90,000 less $62,000) of the other money traced to "Allied," leaving over $40,000 unaccounted for, a "substantial" sum under any definition of that word. What weight the jury should give to this evidence was for them, and them alone, provided that it satisfied their minds beyond any fair doubt.

Finally, as to the complicity of Ward, Bowers and Potter. The record shows again and again that all these men were deeply involved in the management of "Allied's" business. The corporation paid no dividends, and the expenses consisted of salaries of $6,250 to each of the three, the daily wages of "loaders" and sundry disbursements claimed in the return. Who but these three could have received the sums unaccounted for, it is impossible to conceive.

This completes all we need say as to the sufficiency of the evidence, and we shall from now on proceed to dispose

of the succeeding eleven "Points" of the defendants' by their numbers, assuming an acquaintance with the arguments made in them.

Point III

The indictment charged an "attempt to defeat and evade a large part of the taxes due and owing" from "Allied" "by filing and causing to be filed • • • a false and fraudulent tax return." Apparently the argument is that it was a fatal variance as to Potter and Bowers because they were not shown to have had any part in the actual filing of the return. We are not clear that the Fifth Circuit in *Vloutis* v. *United States,* 219 F. 2d 782, 790, meant so to hold; but, if so, we cannot understand why §2 of Title 18, U. S. C. does not cover the occasion, for, if Ward filed a fraudulent return, it is not possible that he did so on his own, or that the other two did not "aid" and "abet" him; and, if so, they were "principals." Our decision in *United States* v. *Albanese,* 224 F. 2d 879, is not reconcilable with any other theory; and this was likewise the ruling in *Imholte* v. *United States,* 226 F. 2d 585, 589 (C. A. 8).

Point IV

The maximum sentence under §3616(a) of Title 26 is a year and the crime charged in the indictment was for filing a fraudulent income tax return, under §145(b) of that Title, so that if only §3616(a) applies the defendants ought not to have been sentenced for more than a year. We held the contrary in *United States* v. *Moran,* 236 F. 2d 361, 363 and *United States* v. *H. J. K. Theatre Corporation,* 236 F.

2d 502, 503; and the Supreme Court denied certiorari in *United States* v. *Moran.* However, in *United States* v. *Costello* in which on December 13, 1956, we made the same ruling, the Supreme Court has just granted certiorari on January 28, 1957; and until that writ is disposed of we cannot know whether a sentence of more than one year is valid under §145(b). The minority in *Berra* v. *United States,* 351 U. S. 131, 140, did not say that a sentence under §145(b) was wholly invalid, but only that the choice of sections was not open to the prosecution. Since the defendants were confined on June 5, 1956, they would, if sentenced for a year, be entitled under §4161 of Title 18 to a "good time allowance" of five days a month, which is 60 days, and they would not be entitled to a release at the earliest until April 6, 1957. The question is, therefore, premature until then, and may have been already decided when the day arrives.

Point V

The judge left to the jury four possible hypotheses in order to help clarify the issues. In two of these he suggested that they might take "Allied's" bank deposit as income; and, as we have said, there was about $28,000 in that account that was not definitely identified as income. However it was shown to have been made up of hundreds of small cheques, and the only possibility that these were not income is that "Allied" might have been in the habit of cashing such cheques for others. Considering the number and size of these and the business of "Allied," this was at best no more than an argument to be addressed to the jury.

The judge charged that "any figure in this case from $5,000 up to $73,849 would be a substantial amount," from which it was plain that he meant that anything less would not be "substantial," as it must be if the prosecution was to succeed. How that can be thought prejudicial to the defendants passes our understanding.

Point VI

The motion to suppress evidence received from the State Crime Commission was delayed till the cause had been sent out for trial, till 40 jurors had been assembled, and the prosecution was about to open. That was on February 6th, 1956, and concededly the defense had known of the whereabouts of the papers since December. Rule 41(e) puts the grant of such a hearing in the discretion of the judge unless made "before trial" and here if the trial had not literally begun, the hearing would have delayed it, and the occasion was within the purpose of the limitation.

Moreover, no evidence was suggested to support the premise that the seizure of the books by the State Crime Commission was with the connivance of the Department of Justice.

Point VII

There was ample testimony from the way the business was conducted that it was part of the foreman's business to sign "slips" for the truckers and that it was the practice of the truckers to keep them. This evidence made the "slips" competent; anything else would defeat the busi-

ness entries statute, 28 U. S. C. §1732. We have already considered the competency of White's books of original entry.

Exhibit 222 does, however, present a question. It was a contemporary memorandum, made by Lechner, an assistant of Abbate, who was a superintendent of the American Export Line. It purpoted to record a telephone message from Denniston, an assistant to Abbate, and Lechner made the record because Abbate was not present at the time of the call. Denniston's message so recorded was that Bowers had told him that "any figures regarding the number of men used for loading at Pier 84, N. R. were not to be used by the American Export Line." The question was whether this entry was competent evidence of Bower's instruction to Denniston. In the first place the defendants are mistaken in speaking of the record as "double hearsay." What Bowers said to Denniston was not a statement of fact at all, but an instruction to be followed in the future by the Export Line. Moreover, although Denniston did not remember it, any record he might have made of it would have been competent as recorded memory.* Furthermore, although Lechner had no recollection of what Denniston told him, the record was as competent as his testimony would have been, had he remembered the message. True Lechner's recollection would have been hearsay of Bower's instruction, but we see no reason why it should not be given credence as well as a recorded entry by Denniston. If Denniston had, for example, repeated into a dictograph what Bowers had said, when he found that he could not im-

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* *Wattenmaker* v. *United States*, 34 F. 2d 741 (C. A. 3); *Putnam* v. *Moore*, 119 F. 2d 246, 248 (C. A. 5); *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama*, 140 F. 2d 13, 16 (C. A. D. C.); *Ettelson* v. *Metropolitan Life Ins. Co.*, 164 F. 2d 660, 667 (C. A. 3).

mediately report to Abbate, no one would doubt that the dictograph record would have been competent evidence of the instruction. Denniston used Lechner as a substitute, that being the practice in the company's business, although it is of course true that the veracity of Lechner's record depends upon his testimony and that there intervenes an oath instead of a mechanical contrivance. If such evidence is not competent, we have made an irrational fetish of the rule against hearsay egregious to any reasonable purpose. We do not share Judge Frank's doubt as to the competency of the record; on the contrary we hold that the record is within the latitude given by Criminal Rule 26.

Point VIII

(A) The evidence as to who were the "loaders" at Pier 86, in 1952, was certainly relevant as to the existence of the supposititious "Ryan" and "Reilly," for they had had no reason in that year to disappear. If they had "loaded" on the piers here in question there was no apparent reason why they should not have "loaded" on this intermediate pier.

(B) The testimony that in 1952 Bowers rented loading machines on a 50-50 basis was not irrelevant to the question whether he had rented machines at the same rate in the year before.

(C) Bowers' instruction to Denniston in November 1952 was relevant to show his wish to suppress evidence that not more than ten men were ever employed as "loaders" on pier 84. It was the defendants' position, as has already appeared, that the limitation of "loaders" to those licensed by "Allied," was not observed in practise, and

the larger the number who in fact "loaded" on the pier the more plausible that position became.

(D) It was proper to put in evidence Bowers' signature of the income tax return for 1952 to throw light upon his position in "Allied." It was wholly immaterial whether it incidentally showed that part of his testimony in Exhibit 534A was false; for upon no theory did this invade his privilege against incrimination.

Points IX and XI

The evidence procured from Guttman as to his transactions with Ward was relevant to show that Ward cashed many cheques, issued by truckers for loading tickets, some of them being payable to "Cash" or "Reilly." This being shown, it was proper for the prosecution to press to the limit the relations between the two men.

The defendants make the added challenge to this testimony that they make to the examination of a number of the "loaders," of the printer, of Applegate and of others who dealt with the defendants in matters relevant to their business. The error in all these instances is, stated generally, that the prosecution having called the witnesses, was allowed to impeach them by showing that they had made contradictory statements, and that this was in effect to substitute the early statements in the jurors' minds for their testimony at the trial. Historically, the doctrine that one may not "impeach" a witness whom one has called, rests upon the notion that the party who calls him vouches for his credibility,—a notion apparently going back to the time when all trials were deemed in some degree to demand a divine sanction. A party depended upon the oaths of his

witnesses, not because of rational inferences from what they said, but because "they were 'oath-helpers' by whose mere oath, taken by the prescribed number of persons in the proper form, the issue of the cause was determined,"* As Judge Sanborn said in *London Guarantee & Accident Co.* v. *Woelfle*, 83 F. 2d 325, 332, the rule has "come to be more honored in its breach than in its observance," for we deem it now settled that the practice is permissible in the discretion of the judge. Contradictory statements may have a legitimate purpose even though in the words of Dean Wigmore, §1018(b), they "are not to be treated as having any substantial and independent testimonial value"; and taken by themselves they no doubt are not to be so recognized.** They may, however, in fact revive the witness's memory and satisfy him that he was right the first time or, they may show him the danger of persisting in testimony whose falsity is now detected, and in making him recant. In either event they have a proper function, now generally recognized, even though by itself they have no "testimonial value."

But even when they produce neither result, logically at any rate there is at times no reason to deny their competency. It is one thing to put in a statement of a person not before the jury: that is indeed hearsay bare and unredeemed. But it is quite a different matter to use them when the witness is before the jury, as part of the evidence derived from him of what is the truth, for it may be highly probative to observe and mark the manner of his denial,

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* Wigmore, §896.

** *Bridges* v. *Wixon*, 326 U. S. 135, 154; *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co.*, 185 F. 2d 285, 289 (C. A. 2).

which is as much a part of his conduct on the stand as the words he utters. Again and again in all sorts of situations we become satisfied, even without earlier contradiction, not only that a denial is false, but that the truth is the opposite: "The lady doth protest too much, methinks." This is not to rely upon the statement as a ground of inference, taken apart from the sum of all that appears in court; it is to allow the jury to use the whole congeries of all that they see and hear to tell where the truth lies. We and other courts have a number of times allowed this course to be taken.* Indeed to deny this is to hold that nothing that comes from a witness on the stand can be used in support of the issue except his words under oath: the rest of his conduct may be used to refute what he asserts, but for nothing else. In short, out of the whole nexus of his conduct before the jury, they may treat those words alone as affirmatively relevant.

For the foregoing reasons we should not have been willing to reject the contradictory statements, even had the jury been allowed to use them as part of the evidence though the declarants did not "adopt" them. Why it should be thought improper to accept an earlier statement that the witness does "adopt," we are not advised. It is not, however, necessary in the case at bar to hold that the earlier statements might have been so used, because in the "supplementary" charge the judge made it abundantly clear that, except in the case of the defendants themselves, only the witnesses' testimony on the stand was to be taken

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* *Di Carlo* v. *United States*, 6 F. 2d 364 (C. A. 2); *Curtis* v. *United States*, 67 F. 2d 943 (C. A. 10); *London Guarantee & Accident Co.* v. *Woelfle*, *supra* (83 F. 2d 325); *Wheeler* v. *United States*, 211 F. 2d 19, 26 (C. A. D. C.); *United States* v. *Graham*, 102 F. 2d 436, 443 (C. A. 2).

as evidentiary. However unlikely it may be that this is a feat possible for most minds, when the contradictions have once come before them, it is not as difficult as that required by the more intricate bit of mental gymnastic involved in confining the use of a defendant's admissions when they concern other defendants as well as him. *Paoli* v. *United States,* United States Supreme Court, January 14, 1957. We should indeed welcome any efforts that help disentangle us from the archaisms that still impede our pursuit of truth.

Point X

Next the defendants complain of the "bias" shown by the judge throughout the trial and in his charge. It is quite true that throughout the seven weeks he intervened repeatedly and at length in the examination of witnesses, though never, so far as we have found, with any intemperateness or attempt to coerce a witness, and always in an effort to clarify the facts, especially when the immediate question was as to the admission of evidence. The defendants upon their side were endlessly obstructive, raising objection upon objection of the most formal kind, sprinkled with repeated motions for a mistrial. Patently, the judge thought it part of his duty, as indeed it was,* to see that all the facts were brought out. Nevertheless, over and over again, with what in the end became tiresome iteration, he told the jury that the responsibility was theirs, and that, if he had intimated, or should intimate, any opinion or conclusion of his own, they were not to let it stand in the way of their unimpeded judgment. It is true that he refused to

* *Pariser* v. *City of New York,* 146 F. 2d 431, 433 (C. A. 2).

charge them as to some mediate propositions of fact—as, for example, that the prosecution must prove that "Allied" had a "monopoly" of "loading" on the four piers—but in this he was right, for to do so is usually hazardous, and never necessary, provided that in the end he makes clear what are the eventual constituent facts that determine guilt, as he did redundantly, in his "supplementary" charge correcting several mistakes into which he had slipped in 58 typed pages of what he said at first.

The only instance to which we are referred that can be thought to be questionable was when he said that "the heavy tread of false swearing is stalking through the record," which he at once followed by another adjuration that his opinion was not to "affect your judgment. * * * It is your function, and your function alone, to decide who told the truth, who didn't tell the truth." It would be absurd to reverse the conviction on this ground, even though it may not have been a happy locution. It is indeed impossible to lay down any general rule that will help to define the limits beyond which a judge may not step in his dealing with a jury. That there are such everyone agrees, and we have so held;* but the occasion must be one where it is apparent that he has assumed an attitude which goes further than to express his personal opinion. He must give them to suppose that he is more than an impartial observer; and that what he says has the backing, however vague, of legal authority.** We have found nothing in the record of this long and bitterly fought trial to justify any such conclusion.

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* *United States* v. *Marzano*, 149 F. 2d 923; *United States* v. *Brandt*, 196 F. 2d 653.

** *Guthrie* v. *Curlett*, 36 F. 2d 694 (C. A. 2); *Pariser* v. *City of New York*, *supra* (146 F. 2d 431); *United States* v. *Aaron*, 190 F. 2d 144 (C. A. 2); *United States* v. *Giallo*, 206 F. 2d 207 (C. A. 2).

Appendix A

Points XII and XIII

The defendants complain of a notice given out to the New York press generally during the trial, announcing the indictment of one, Connolly, for income tax evasion. The notice read that the "unreported income was mainly derived from Connolly's position as editor of the Longshore News, a now defunct monthly newspaper, published by the Atlantic Coast District of the I. L. A. Additional monies" [sic] "which the defendant failed to report were obtained as fees for attendance at meetings of the executive board of the Atlantic Coast District." We do not understand that there is any complaint of this much of the notice, but it went on to say that before becoming "Executive Vice President of the I. L. A., Connolly was President of Local 824. Another former officer of that local, Mickey Bowers, is presently standing trial in the Federal Court here for income tax evasion in connection with his operation of the Allied Stevedoring Company. Connolly was among the organizers of this public loading company and was its first president." Moreover, some of the newspapers who published this notice or the substance of it described the local as "Pistol Local 824." The judge examined each member of the jury and found that seven had read what had been published; but all who had done so declared that it had not "impaired" his or her "judgment." The notice had been prepared by an assistant district attorney who delivered it to his chief, and he, when he informed the reporters of the Connolly indictment, appears to have included the second quotation, although his assistant had anticipated that he would not do so.

The notice did indeed show that Bowers had been president of the International Longshoremen's Association;

but it had become apparent all through the trial that all "Allied's" "loaders" were members of that union with whom the defendants were necessarily in constant cooperation. So far as the union had acquired any unsavory reputation which might smirch the defendants, it would therefore have been substantially impossible to escape it without an elaborate insistence upon concealment that would have involved a damaging atmosphere of suppression. When all is said, if the associates of an accused person have a bad reputation, the best that can be done is to avoid all allusions to them that can be escaped; and, if that be not enough, there would be no alternative but to try him where the offense was not committed which would be unconstitutional. Moreover, Bowers' connection with the union could have affected only him, and in his voluntary statement before trial to a "special assistant to the Attorney General" he had already said on March 18, 1953 that he was "affiliated with" Local 824, although he had not held "any position" in it. That later he became its president was not an added circumstance of enough importance to count.

Finally, the income tax that Connolly was charged with evading had not the remotest connection with that under scrutiny in this prosecution, so that the whole supposed harm comes down to the fact that a former president of the Local was charged with the same kind of offense in an utterly dissimilar setting. The Supreme Court has indeed shown itself extremely sensitive to "official intrusion into the privacy of the jury";* but here there was nothing that by the widest stretch can be so regarded. No doubt

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* *Remmer* v. *United States,* 350 U. S. 377; *Gold* v. *United States,* January 28, 1957, U. S. Supreme Court.

that is not the entire measure of what may upset a verdict; the press may at times so poison the surrounding atmosphere that it is impossible to have a fair trial at all and the guilty may escape;* but it would be to the last degree undesirable to upset judgments, in all other respects just and reasonable, because of circumambient gossamers which not only the jurors said had had no influence upon them, but which would not have had substantial influence upon anyone who was capable of impartial judgment.**

It does not seem to us necessary to discuss the charge that the prosecution exceeded the proper limits of propriety. There can be no reasonable, indeed scarcely a possible, doubt that these three men had together engaged in a sordid effort to cheat the Treasury: that is, the citizens at large, for in one way or another it is they who must make up for their thefts. They had a fair trial; they were protected by counsel whose assiduity and skill were manifest throughout. One of them has had the benefit of the jury's recommendation for lenity, the reason for which is not apparent in the record. That they should escape in the tangle of jural subtleties in which their guilt has been enmeshed, would be a failure to achieve the purposes for which courts are supported.

Judgment affirmed.

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* *Shepherd* v. *Florida,* 341 U. S. 50.

** *United States* v. *Keegan,* 141 F. 2d 248, 258 (C. A. 2); *United States* v. *Leviton,* 193 F. 2d 848, 857 (C. A. 2).

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in New York City, on the 4th day of February, 1957.

Present:

Hon. CHARLES E. CLARK, *Chief Judge*,

Hon. LEARNED HAND, *Circuit Judge*.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALLIED STEVEDORING CORP., JOHN WARD, JOHN POTTER and MICHAEL BOWERS,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

APPENDIX C

PRESS REPORT

Trial Court's Exhibit 5 for Identification

DAILY NEWS, FRIDAY, FEBRUARY 24, 1956

Indict Packy Connolly As Income Tax Dodger

A special federal grand jury investigating crime on the waterfront yesterday indicted Patrick J. (Packy) Connolly, executive vice president of the International Longshoremen's Association, as an income tax dodger. It charged he failed to pay $3,251 in taxes due for 1949, 1950 and 1951.

Connolly, 55, of 55 E. 10th St., is a former president of the ILA's "pistol local" No. 824.

Three of that local's leaders, including former president Mickey Bowers, are on trial now on charges of trying to evade payment of $43,331 in corporate taxes due in 1951 from the Allied

Patrick J. (Packy) Connolly
Faces federal rap

Stevedoring Corp. which they operated.

Connolly went light $12,050 in reporting his income for the years in question and most of the unreported money came from his side job as editor of the defunct Longshore News, according to U. S. Attorney Paul Williams.

The prosecutor said Connolly took in $11,800 in 1949 and reported $10,700; received $16,500 in 1950 and reported $10,700; got $14,900 in 1951 and reported $9,750. He paid $8,079 in taxes during the period.

Connolly, who is to appear for pleading March 1, declared he is [illegible] of the charges.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	7
Conclusion	16

CITATIONS

Cases:

Bedell v. *United States*, 78 F. 2d 358, certiorari denied, 296 U. S. 628	13
Brzezinski v. *United States*, 198 Fed. 65	14
Carantzas v. *Iowa Mutual Insurance Co.*, 235 F. 2d 193	13
Delaney v. *United States*, 199 F. 2d 107	12
Ettelson v. *Metropolitan Life Ins. Co.*, 164 F. 2d 660, affirmed, 317 U. S. 188	14
Fred Harvey Corp. v. *Mateas*, 170 F. 2d 612	13
Harrison v. *United States*, 200 Fed. 662	12
Hofstadter v. *Ruderman*, 118 F. Supp. 477	14
Ilseng v. *United States*, 120 F. 2d 823, certiorari denied, 314 U. S. 665	16
Langer v. *United States*, 76 F. 2d 817	12
Nicholls v. *Webb*, 8 Wheat. 326	15
Nye & Nissen v. *United States*, 336 U. S. 613	9
Ohio Associated Telephone Co. v. *National Labor Relations Board*, 192 F. 2d 664	13
Palmer v. *Hoffman*, 318 U. S. 109	15
Shepherd v. *Florida*, 341 U. S. 50	12
Shokuwan Shimabukuro v. *Higeyoshi Nagayama*, 140 F. 2d 13, certiorari denied, 322 U. S. 755	14
Smith v. *United States*, 236 F. 2d 260, certiorari denied, 352 U. S. 909	16
Stegemann v. *Miami Beach Boat Slips*, 213 F. 2d 561	16
Terry v. *United States*, 51 F. 2d 49	13

Cases—Continued

	Page
United States v. *Achilli*, 234 F. 2d 797	7, 8
United States v. *Costello*, 221 F. 2d 668	7, 8
United States v. *Doyle*, 234 F. 2d 788, certiorari denied, 352 U. S. 893	8
United States v. *Grayson*, 166 F. 2d 863	14
United States v. *Johnson*, 319 U. S. 503	9
United States v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U. S. 909	8
United States v. *Rosenberg*, 200 F. 2d 666, certiorari denied, 345 U. S. 965	12
Vloutis v. *United States*, 219 F. 2d 782	10
Wattenmaker v. *United States*, 34 F. 2d 741	14
Statutes:	
Act of June 20, 1936, c. 640, 49 Stat. 1561, Sec. 1, 28 U. S. C. 695	15
Internal Revenue Code of 1939:	
Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b))	2, 4, 7
Sec. 3616 (a) (26 U. S. C. 1952 ed., Sec. 3616 (a))	2, 3, 7, 8
18 U. S. C., Sec. 2	9
28 U. S. C.:	
Sec. 1732	3, 14, 15
Sec. 2255	8
Miscellaneous:	
Federal Rules of Criminal Procedure, Rule 35	8
S. Rep. No. 1965, 74th Cong., 2d Sess.	15
III Wigmore on *Evidence* (3d ed.), Sec. 751	14
V Wigmore on *Evidence*, (3d ed.), Sec. 1521	15

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 842

ALLIED STEVEDORING CORPORATION, JOHN WARD, JOHN POTTER AND MICHAEL BOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19–39) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1957 (Pet. 40–41), and a petition for rehearing was denied on February 22, 1957. The petition for a writ of certiorari was filed March 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). (Pet. 2.)

QUESTIONS PRESENTED

1. Whether the trial court erred in imposing sentences on the petitioners under Section 145 (b), Internal Revenue Code of 1939, in excess of those which could have been imposed under Section 3616 (a) of the Code.

2. Whether there was a fatal variance between the indictment and the proof as to petitioners Bowers and Potter.

3. Whether the petitioners were deprived of a fair trial by publicity in the daily press.

4. Whether the trial court erred in admitting a written memorandum of an instruction which petitioner Bowers had orally given to a Government witness.

5. Whether the trial court erred in admitting certain books, which were identified by a witness who had made totalling entries in them, as the daily business records of a third party who had died prior to the trial.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C. 1952 ed., Sec. 3616 (a).)

28 U. S. C.:

SEC. 1732. *Record made in regular course of business; photographic copies.*

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

* * * * *

STATEMENT

On July 29, 1953, the petitioners were indicted in the United States District Court for the Southern District of New York on charges of willfully attempting to evade a large part of the income taxes of the Allied Stevedoring Corporation ("Allied") for the calendar year 1951 by filing, and causing to be filed, a false return in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 1.)[1] The indictment alleged that the corporation's net income and the tax liability reported in the returns and corrected were as follows (R. 1a–2a; 5):

Year	Reported		Corrected	
	Net income	Tax	Net income	Tax
1951	$137.49	$39.53	$71,846.07	$43,331.61

[1] The record consists of six volumes comprising the appendices to the briefs in the Court of Appeals. The appellants' typewritten appendix 1 through 1509 and the Government's printed appendix 1a through 843a are designated herein as "R". The Government's exhibit volume 1 through 50 is designated "Ex. Vol."

A jury trial began on February 6, 1956. (R. 3a.) On March 23, 1956, after twenty-eight days of trial (R. 1360), a verdict of guilty as charged was returned as to each of the petitioners. (R. 1496.) Motions to set aside the verdict as to each defendant were immediately made and denied. (R. 1499.) On April 16, 1956, Allied was fined $10,000; John Ward was fined $10,000 and one-half the costs of prosecution and sentenced to four years imprisonment; John Potter was sentenced to imprisonment for a year and a day; and Michael Bowers was fined $10,000 and one-half the costs of the prosecution and given a five-year prison term. (R. 6–12.) The convictions were affirmed by the Court of Appeals for the Second Circuit. (Pet. 19–41.)

Allied was a loading company operating on New York City public piers 84, 88, 90, and 92. (R. 245a–260a, 410a–414a; 627–632; Ex. Vol. 8–10, 22.) Its business was to load and unload trucks transporting cargo to and from the piers. During 1951 and at the time the corporate income tax return for that year was filed, petitioners Ward and Potter were the firm's president and vice president, respectively. (R. 820a–821a, 824a–825a; Pet. 5.) Petitioner Bowers served as the corporate secretary until August 1951, when he became secretary-treasurer, which he remained throughout the period involved. (R. 96a–97a, 814a.) The books of the corporation recorded disbursements in detail but indicated receipts only by showing bank deposits. (R. 21a–25a, 29a–40a.) The corporate return was prepared on the basis of these books and bank records. (R. 24a–25a.) Ac-

cordingly, receipts not deposited were omitted from it.

The Government's evidence showed that only $3,727 in cash had been deposited in the corporation's bank account (R. 726a; Ex. Vol. 34), even though the John White & Company had alone paid Allied $29,183 during the year for the rental of loading machines (R. 727a), which, it was conceded at trial, was paid in cash (R. 747a). In addition, Allied had been paid $50,972.60 for loading services performed by its employees and for the rental of other loading machinery owned by it, none of which had been deposited in the corporate account or recorded in its books.[2] (R. 694a–699a; Ex. Vol. 4, 33.) The evidence of this income was the testimony of numerous witnesses as well as cancelled checks, records, and loading tickets issued by Allied to the drivers of trucks that had been loaded. (R. 191a–196a, 197a, 206a–211a, 215a–218a, 220a–223a, 224a–228a, 229a–230a, 270a–271a, 272a–284a, 289a–291a, 515a–521a, 522a–526a, 537a–539a, 612a–667a, 701a–710a; Ex. Vol. 4.) The checks given in payment for these services were variously made payable to Allied (Ex. Vol. 6, 21), "cash" (Ex. Vol. 27, 29–30), a variety of fictitious payees,[3] and John

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[2] This figure was reduced by $1,453.24 in the Government's computation of unreported income (Ex. Vol. 33) to eliminate a 7% charge made by Joseph A. Marcell, a collector, who collected $20,760.57 of the unreported income for the corporation. (R. 728a; Ex. Vol. 4.)

[3] *E. g.:* Mike Reilly, John Reilly, Tom Reilly, John Ryan, M. Sullivan. (R. 699a; Ex. Vol. 16, 19–20, 24, 48–49.) Though extensive efforts were made by the defense to show that these men were actually loaders operating independently on the same piers as the petitioners (R. 292a–371a, 375a–392a, 435a–

Marcell (Ex. Vol. 31, 32) who made collections for Allied (R. 136a). The fictitious payees were unknowingly used by the drawers of the checks upon instructions of employees of Allied (R. 227a, 235a; 847; Ex. Vol. 23). Some of the fictitious names were pseudonyms for petitioner Ward who used them in endorsing and cashing a number of checks. (R. 213a–214a, 582a–584a, 588a–591a, 618a). Other checks payable to fictitious payees were cashed by Edmund Leahy, an employee of Allied hired by petitioner Potter (R. 376a; 1180–1198), and Raymond Lussa, an acquaintance of petitioner Bowers (R. 604a–605a, 1180–1198).

The total of the unreported receipts shown by the Government's evidence was $73,850.19. (R. 728a–729a; 1274; Ex. Vol. 33.)

ARGUMENT

1. Petitioners first challenge the legality of their sentence under Section 145 (b) of the Internal Revenue Code of 1939, contending that they should have been sentenced under Section 3616 (a) of the Code. (Pet. 10.) This issue is presently before the Court in *United States* v. *Achilli,* 234 F. 2d 797 (C. A. 7th), pending on certiorari, this Term, Nos. 430 and 834, and *United States* v. *Costello,* 221 F. 2d 668 (C. A. 2d), pending on certiorari, this Term, No. 666.

447a, 453a–503a, 509a–514a, 540a–575a, 597a–617a), the Government's evidence established that only the Allied Stevedoring Corporation was permitted to do loading on piers 84, 88, 90, and 92 (R. 245a–260a, 410a–414a, 627–632; Ex. Vol. 8–10, 22) and that no men by these names were known to have done loading on them (R. 174a–175a, 264a–265a, 670a, 681a, 685a–688a, 691a).

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We doubt, however, that the issue is properly presented here, since it was not passed upon by the court below. Instead, the court held (Pet. 28) that the individual petitioners, had they been sentenced under Section 3616 (a), "would not be entitled to a release at the earliest until April 6, 1957," and that therefore the question was then premature.[4] Since April 6, 1957, it appears that petitioners have taken no steps to obtain a further adjudication of the legality of their sentence in either the District Court or the Court of Appeals.[5]

2. Petitioners Potter and Bowers contend that the trial court erred in denying a motion to dismiss the indictment against them made on the grounds that the evidence did not show that the manner in which they attempted to evade and defeat the corporation's income tax was by filing, or causing to be filed, a false return as charged in the indictment. (Pet. 11–13.) The court below properly rejected this contention, pointing out that, even assuming only Ward actually

[4] The case was decided by the Court of Appeals on February 4, 1957.

[5] In *United States* v. *Doyle*, 234 F. 2d 788 (C. A. 7th), certiorari denied, 352 U. S. 893, and *United States* v. *Moran*, 236 F. 2d 361 (C. A. 2d), certiorari denied, 352 U. S. 909, where the identical question was not properly raised in the trial court, this Court denied certiorari. In *United States* v. *Costello*, 221 F. 2d 668 (C. A. 2d), now pending on certiorari, this Term, No. 666, the issue was properly raised by motions under 28 U. S. C., Section 2255, and under Rule 35, Federal Rules of Criminal Procedure; and in *United States* v. *Achilli*, 234 F. 2d 797 (C. A. 7th), now pending on certiorari, this Term, Nos. 430 and 834, the petitioners contended that a motion in the trial court raised the issue and later moved for a correction of sentence under 28 U. S. C., Section 2255.

filed the return, Bowers and Potter having aided and abetted him were guilty as principals under 18 U. S. C., Section 2 (Pet. 27), on which the jury was charged (R. 1372). *Nye & Nissen* v. *United States,* 336 U. S. 613, 618–619; *United States* v. *Johnson,* 319 U. S. 503, 518.

Petitioners Potter and Bowers attack this holding, alleging that there is no evidence they had knowledge of the filing of the false return and that they therefore could not have been aiders or abettors. (Pet. 11.) This allegation is not supported by the record. Bowers was the secretary-treasurer of the corporation when the return was prepared. Together with Ward, he negotiated for the services of Joseph Feinbaum, the accountant who prepared the return from the corporate records and bank statements. (R. 20a–21a.) Potter, the vice president of the organization during this period, furnished its accountants with records of the bank deposits to be entered in the books. (R. 830a–831a.) Though he was aware of large cash receipts from the rental of loading equipment, he failed to advise the accountants of them. (R. 837a.) Both men withdrew cash for their own use which they knew had not been deposited or recorded. (R. 813a–814a, 825a–826a, 832a–833a.) The record thus amply supports the conclusion that both Potter and Bowers had knowledge that a false return was being filed and indeed "caused" it to be filed as charged in the indictment.

The question is therefore not reached in this case whether, in the absence of such proof, that portion of

an indictment specifically charging tax evasion by filing a false return may be disregarded as surplusage. (Pet. 11–13.) Compare *Vloutis* v. *United States,* 219 F. 2d 782, 790 (C. A. 5th).

3. Each of the petitioners urge that they were deprived of a fair trial by allegedly prejudicial newspaper publicity which they contend was generated by the United States Attorney. They complain that during the course of the trial he caused the indictment of their associate, Patrick J. Connolly, and issued a press release (set out at Pet. 5–6) which was prejudicial to them. (Pet. 13–14.) Specifically they refer to an article which appeared in the *New York Daily News* on February 24, 1956, the day following the release. This article, after relating that Connolly had been indicted as an "income tax dodger", described him as a former president of International Longshoremen's Association "pistol local" No. 824 and stated "[t]hree of that local's leaders, including former president Mickey Bowers, are on trial now on charges of trying to evade payment of $43,331 in corporate taxes due in 1951 from the Allied Stevedoring Corp. which they operated."[6] (Pet. 42.) They also complain of articles announcing the instigation of prosecution of three public loaders in the area on charges of failing to file in-

[6] The petitioners state that the court below in describing Bowers as the former president of Local 824 compounded the article's erroneous description of him as a former officer. (Pet. 14) In this they are in error. The article did in fact refer to him as the former president. (Pet. 42.)

come tax returns though admittedly they were not mentioned in them. (Pet. 7, 14.) Apparently their contention is that these publications induced the jurors to determine their guilt on the basis of their association with a union local in which a former officer was accused of a similar crime or because they had been engaged in an industry in which others had been indicted for tax offenses. This contention is also not supported by the record.

On the afternoon of February 24, 1956, the day following the Connolly indictment and press release, the trial court questioned the jurors to determine if any of them had read the resulting publicity. Five of them indicated that they had read the article carried in the *Daily News* that morning.[7] Each stated that his judgment had not been affected. (R. 618, 620–624.) None of them had discussed the article with their fellow jurors. (R. 626.) Nevertheless, the trial court instructed them that they should not permit newspaper articles to affect their judgment and that they should refrain from reading them until the trial had ended. (R. 627.) There is no showing, nor is it contended, that any of the articles alleged to be prejudicial were read after this instruction. On March 22, 1956, twenty-seven days later, the jurors retired to consider their verdict. (R. 3, 1477.) It appears plain that the verdict they returned was based on the evi-

[7] One juror had read an article concerning the Connolly indictment carried in the *New York Times*. (R. 620.) It did not mention the petitioners. (R. 25.) Another juror had read a similar article in the *World-Telegram* but stated that it made no reference to the petitioners. (R. 623.)

dence adduced in twenty-eight days of trial (R. 3, 1360), unbiased by an article read twenty-seven days previously which in no way purported to pass on the petitioners' guilt, and that the court below properly concluded that "there was nothing that by the widest stretch" could be regarded as intrusion into the jury's privacy. (Pet. 38.)[8]

4. Petitioners contend that the trial court erred in admitting into evidence a memorandum of a telephone call directed to Stephen S. Abbate, Superintendent of Terminals, American Export Lines (R. 410a), by William Denniston, his assistant (R. 400a; Pet. 14-

[8] The cases cited by the petitioners are distinguishable on their facts. The reversal in *Shepherd* v. *Florida*, 341 U. S. 50, was based on other grounds; newspaper articles read by the jurors which falsely stated that the defendants had confessed were criticized in a concurring opinion (pp. 51–55). In *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1st), and *Harrison* v. *United States*, 200 Fed. 662 (C. A. 6th), reversal occurred because publicity attendant to governmental operations not connected with the prosecution indicated the defendants were guilty. In *Delaney*, *supra*, it was held that a highly publicized congressional committee hearing had in effect tried the defendant shortly before the trial, and in *Harrison*, *supra*, the Post Office Department published a fraud order during the trial warning the public that the defendant was committing the very crime for which he was being tried. In *United States* v. *Rosenberg*, 200 F. 2d 666 (C. A. 2d), certiorari denied, 345 U. S. 965, though critical of publicity concerning the perjury indictment of a prospective Government witness who was to corroborate testimony already given in the Government's case, the court held (pp. 669–670) that it did not vitiate the jury's verdict. Similarly, in *Langer* v. *United States*, 76 F. 2d 817 (C. A. 8th), reversed on other grounds, the court refused to review the trial court's denial of a motion for a new trial based on the claim that the jury was prejudiced by publicity hostile to the defendants.

16). The memorandum was made by Louis Lechner, Abbate's clerk, who in his absence took the call and made a memorandum of it, pursuant to the regular office procedure. (R. 449a–451a.) The portion of the memorandum to which the petitioners object recorded that Denniston "telephoned * * * to advise that a Mickey Bowers informed him [Denniston] that any figures regarding the number of men used for loading at Pier 84, N. R. were not to be used by the American Export Lines, Inc.". (Pet. 9, 16.) They contend that this was multiple hearsay and therefore should not have been admitted. (Pet. 3, 14–16.)

As the court below points out, this contention mistakes the nature of Bowers' statement. (Pet. 30.) It was not an assertion of fact regarding the number of men loading on the pier but an instruction given directly to Denniston that figures should not be used by his company. As the petitioners concede (Pet. 16), it was introduced to show what Bowers had said. Accordingly, what Lechner recorded in the memorandum when Denniston called was not hearsay concerning any fact asserted by Bowers, for he had asserted none, but only a record of what Bowers had said. This was not hearsay. *Terry* v. *United States,* 51 F. 2d 49 (C. A. 4th); *Carantzas* v. *Iowa Mutual Insurance Co.,* 235 F. 2d 193 (C. A. 5th); *Ohio Associated Telephone Co.* v. *National Labor Relations Board,* 192 F. 2d 664 (C. A. 6th); *Bedell* v. *United States,* 78 F. 2d 358 (C. A. 8th), certiorari denied, 296 U. S. 628; *Fred Harvey Corp.* v. *Mateas,* 170 F. 2d 612 (C. A. 9th). The memorandum, having been

made in the regular course of business (R. 418a, 449a-450a), was admissible under 28 U. S. C., Section 1732, or, as the court below pointed out (Pet. 30), as Denniston's record of his past recollection transcribed by Lechner. *Brzezinski* v. *United States*, 198 Fed. 65 (C. A. 2d); *Wattenmaker* v. *United States*, 34 F. 2d 741 (C. A. 3d); *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama*, 140 F. 2d 13 (C. A. D. C.), certiorari denied, 322 U. S. 755; *Ettelson* v. *Metropolitan Life Ins. Co.*, 164 F. 2d 660 (C. A. 3d), affirmed, 317 U. S. 188; *Hofstadter* v. *Ruderman*, 118 F. Supp. 477 (S. D. N. Y.); III Wigmore on *Evidence* (3d ed.) Sec. 751.*

5. Finally, the petitioners contend that the witness who identified the John White & Company records was incompetent to testify that they were kept in the regular course of the company's business and that they were therefore improperly admitted. (Pet. 16–17.) They state that he had no connection with the company or knowledge of its operations. (Pet. 17.) Again the facts do not sustain the petitioners' contention.

The records were identified by Walter T. Hampson as the daily records of disbursements and receipts made by John White (R. 67a), who had died prior to the trial. Mr. Hampson had instructed White to keep such records (R. 66a), and at the end of each week

* In *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2d), quoted by the petitioners (Pet. 15), documents summarizing hearsay information describing oil wells, though made in the regular course of business, were held inadmissible where a fact in issue was the value of the wells.

White submitted them to Hampson who entered the totals in them (R. 67a, 70a–71a) and prepared the firm's formal books from them (R. 78a). Whenever there was a question concerning an entry in them, the two men discussed it together. (R. 74a–75a). Mr. Hampson identified both his own and White's handwritten entries (R. 69a–70a) and testified that White had no other bookkeeper [10] (R. 75a). As this Court noted in *Palmer* v. *Hoffman,* 318 U. S. 109, 112–113, the legislative history of the Federal Business Record Act, now 28 U. S. C. 1732,[11] makes it clear that its purpose is to remove the common law hearsay restriction requiring every book entry to be identified by the entrant. See S. Rep. No. 1965, 74th Cong., 2d Sess., pp. 1–2, quoted in that case (pp. 112–113, fn. 3). The petitioners' contention here would permit only the entrant, the deceased Mr. White, to identify his entries. This result would be directly contrary to the purpose of the statute and the well-settled exception in the common law rule which permitted the introduction of the books of a deceased entrant without personal identification, obviously impossible in the circumstances. *Nicholls* v. *Webb,* 8 Wheat. 326; V Wigmore on *Evidence* (3d ed.) Sec. 1521. Moreover, it is not contended that Hampson was incompetent to identify the totalling entries which he regularly made in the records. These en-

[10] Petitioners state the court below erroneously described Hampson as an accountant. (Pet. 17.) Mr. Hampson testified that he was considered a bookkeeper. (R. 75a.)

[11] Formerly 28 U. S. C. 695, Act of June 20, 1936, c. 640, 49 Stat. 1561, Sec. 1.

tries are themselves records of Mr. White's business and admissible as such. *Stegemann* v. *Miami Beach Boat Slips,* 213 F. 2d 561 (C. A. 5th); *Smith* v. *United States,* 236 F. 2d 260 (C. A. 8th), certiorari denied, 352 U. S. 909; *Ilseng* v. *United States,* 120 F. 2d 823 (C. A. 9th), certiorari denied, 314 U. S. 665. As the court below correctly concluded, petitioners' objection to these records is "patently untenable." (Pet. 26.)

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied. However, since the petition at least tenders the question also involved in the *Achilli* and *Costello* cases (Nos. 430 and 834, and No. 666), this Court may wish to defer disposition of the petition until those cases are decided.

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Petitioners,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Introduction

The Government in its Brief in Opposition (hereafter "Brief") refers in detail to evidence introduced at the trial (Brief, pp. 5-7). This evidence is not pertinent to the points raised in the Petition and its only motivation would seem to be an attempt to prejudice this Court against the petitioners. Many of the statements of evidence are inaccurate and misleading. However, since they are not relevant, no attempt will be made to correct them.

This Reply Brief will be addressed solely to the legal arguments pertinent to the points raised in the Petition. In addition, we will attempt to correct factual errors relevant to these points found in the Government's Brief.

Argument

As to Question 1:

As pointed out at page 9 of the Petition, a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, Title 18 U. S. C., was made to the district court on July 9, 1956, to vacate and correct the sentences imposed on the petitioners because in excess of the maximum sentence permissible under Section 3616(a) of the Internal Revenue Code of 1939, Title 26 U. S. C. That motion was denied by the district court in an extensive opinion dated July 20, 1956. That opinion, which was filed as an order on July 23, 1956, was part of the record below and is incorporated in the record before this Court.

The claimed illegality of the sentences and the alleged error in the district court's decision on the aforementioned motion were pointed out and appealed from by petitioners at pages 21-22 of their brief in the Court of Appeals below. In the Court below petitioners appealed from the judgments of conviction which imposed sentences in excess of one year and/or $1,000 as provided by Section 3616(a). In the opinion of the Court below, and the judgment entered thereon on February 4, 1957, these judgments of conviction were affirmed.

In the application for rehearing made on February 18, 1957, to the Court below, petitioners asked that the Court's decision on said petition be deferred pending decision by this Court on this misdemeanor-felony issue as raised in the case of *United States* v. *Costello,* 221 F. 2d 668 (2d Cir. 1955), pending on certiorari, this Term, No. 666. The Court below denied the application for rehearing on February 25, 1957, and refused to defer its decision.

Accordingly, the statement by the Government in its Brief that the misdemeanor-felony issue "was not passed upon by the court below" is most disingenuous. The Government relies on language by the Court below expressing doubt as to its decision. However, the Court did not refuse to rule on the point, nor did it defer such ruling.

It is submitted that both the district court and the Court of Appeals below adjudicated the legality of the petitioners' sentences and the issue is now properly before this Court.*

As to Question 2:

The district court's charge relating to aiding and abetting did not relate to the issue as to whether the petitioners Potter and Bowers filed or caused to be filed a false return as charged in the indictment. The district court evidently agreed with petitioners' contention at the trial that there was no evidence that these two had knowledge of the filing of the false return. However, the district court denied their motion to dismiss on the ground that the language in the indictment pertaining to "filing and causing to be filed a false and fraudulent tax return" was surplusage (R. 1317-32).** Consistent with this holding that the filing of the return portion of the indictment

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* The petitioners Ward and Bowers were released on bail pending certiorari on April 26, 1957 by order of the trial court and the Hon. L. Hand. Thus the district court and Court of Appeals view this issue as being out of their hands. Denial of this question in the Petition as premature would place the petitioners in an impossible position as far as the bail issue is concerned.

** Record references are in accordance with the Government's practice (Brief, p. 4, fn. 1).

was surplusage, the trial court charged the jury that they need only find evasion "in any manner," in terms of the statute, Section 145(b) of Title 26 U. S. C. (R. 1366-67; 1369; 1370; 1371-72; 1373-74). The court's holding was that the Government could charge in an indictment that a defendant evaded taxes "in any manner" without specifying the manner; and if it did so specify by charging the means was filing and causing to be filed a false and fraudulent tax return, that such restriction on the charge is surplusage.

The Government now attempts to go behind this holding and tries to show that there was evidence of aiding and abetting. This is not proper, since it does not go to the gist of the matter, i. e., the erroneous holding as a matter of law by the trial court, and its charge to the jury. Nevertheless, in fact there was no evidence adduced at the trial as to knowledge on the part of either petitioner as to the return or its contents. The hiring of an accountant is not evidence of filing a false return. The allegation that "Both men withdrew cash for their own use which they knew had not been deposited or recorded" (Brief, p. 9) is not accurate. This is based upon an admission by Bowers in a statement given to the Government (R. 16-21) that on occasion he would take petty cash from the corporation safe. There is no evidence that he knew that these amounts had not been recorded as petty cash, nor is there any evidence that these amounts, which were used as petty cash expense money, were unreported income.

Accordingly, it is submitted that the question *is* reached in this case whether that portion of an indictment specifically charging tax evasion by filing a false return may be disregarded as surplusage.

As to Question 3:

While the cases cited by petitioners on this point may have some factual differences, they are indistinguishable in principle. Where the Government itself issues prejudicial publicity in the course of a trial, a motion for a mistrial should be granted.

The Government alleges in its Brief that the verdict the jury returned was based on the evidence and was not influenced by the prejudicial publicity. Such a statement requires an omniscience which we submit the Government does not have, nor do we. We submit only the proposition that the publicity by its inherently prejudicial nature must have influenced the jury. As to the subsequent publicity noted in the Petition, we do not know whether it was read by the jurors or what effect it might have had on them since the district court refused to hold a hearing or make inquiry of the jury (R. 800-03; 188). Obviously petitioners' counsel at the trial could not interrogate the jurors except through the court.

The case of *United States* v. *Rosenberg,* 200 F. 2d 666 (2d Cir. 1952), cert. denied 345 U. S. 965, is most analogous on its facts. In that case, despite prejudicial publicity issued by the United States Attorney during the course of their trial, the defendants' counsel did not move for a mistrial. The Court of Appeals stated:

> "We may assume that, in this case, a cautionary instruction would not suffice, and that, if defendants had then moved for a mistrial, it should have been granted." (200 F. 2d 670)

As to Question 4:

The Government slurs over the multiple hearsay nature of the memorandum in issue, and seeks to argue only whether the statement attributed to Bowers was admitted in evidence for its truth or as an instruction given by him. As pointed out in the Petition, whether the statement was an instruction or not, there was still multiple hearsay involved, i. e., from Bowers to Denniston to Abbate to Lechner.

The exhibit could not have been Denniston's record of his past recollection transcribed by Lechner, since Denniston never saw the memorandum and had no recollection of the event (R. 584).

The trial court, after considerable doubt as to the admissibility of this memorandum (R. 571-73; 585-91; 1114-51) finally admitted the exhibit, stating that it was not "self-serving" and was not "inherently prejudicial" to the petitioners (R. 1126-29). It is submitted that this exhibit necessarily is hearsay upon hearsay, and is inherently prejudicial.

As to Question 5:

The Government states, as to the alleged White books, that "Whenever there was a question concerning an entry in them, the two men [White and Hampson] discussed it together" (Brief, p. 13). This record reference flaunts the fact that the trial court granted a motion to strike all statements made by the deceased White to Hampson (R. 1291-92).

The objection to the admissibility of the alleged White books is based on the complete absence of any knowledge

on the part of Hampson as to the operations of White's business, or, in fact, that such a business existed. Hampson testified that he had no way of vouching for the accuracy of the information in the exhibits (R. 133); that he was not familiar with the piers (R. 146); that John White & Co. did not have an office (R. 146-47); and that he could not testify as to the truthfulness or accuracy of the entries in the exhibits in question (R. 177).

Hampson never saw White write in the books but merely totalled entries which he had not seen entered (R. 87-88; 90). He said that he identified White's handwriting by the little notes which White would leave for him in a tavern, which notes were thrown away (R. 90). However, Hampson then testified that he never saw the individual who wrote the notes write them (R. 95). Nevertheless, the trial court erroneously overruled objections to the exhibits (R. 82; 96) stating that the witness "has been able to identify the entries in Mr. White's handwriting" (R. 126).

The summaries which Hampson made from these alleged records of White's were conceded by the Government to have probative value only as summaries, and their admissibility stands or falls with the original records alleged to be those of John White & Co.

The Government states that "The petitioners' contention here would permit only the entrant, the deceased Mr. White, to identify his entries" (Brief, p. 15). This is certainly true in this case, since no person other than White had any familiarity with these books and records. John White had eight or nine partners, all allegedly drawing equal partnership profits. Five of these partners who testified at the trial, including two "senior partners,"

stated that they had never seen the records in question (R. 56; 63; 1311; 1313; 1315). It is not unfair to require the keeper of secret records to be the only person to identify such records, especially where their introduction, without being subject to cross-examination, was used to convict three individual petitioners and their corporation of the crime of income tax evasion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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